Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	**MM Docket No. 01-317**
Definition of Radio Markets	)	**MM Docket No. 00-244**

To: The Commission

REPLY COMMENTS OF CUMULUS MEDIA INC.

Cumulus Media Inc. ("Cumulus"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, respectfully submits these Reply Comments in response to the Commission's *Notice of Proposed Rule Making and Further Notice of Proposed Rule Making* in this proceeding (the "NPRM"), 16 FCC Rcd 19861 (2001). [1] In these Reply Comments, Cumulus primarily addresses proposals discussed in certain comments to change the Commission's methodology for defining radio markets.

[1] The deadline for filing reply comments in the proceeding was extended to May 8, 2002, by *Order*, DA 02-946, adopted and released on April 23, 2002.

I. INTRODUCTION

Cumulus believes that the record in this proceeding demonstrates conclusively that the Commission must give effect to the Congressionally determined local radio ownership limitations contained in Section 202(b) of the 1996 Telecommunications Act (the "1996 Act"). Cumulus agrees with the many commenters who have concluded that the express numerical limits contained in Section 202(b) are definitive, and that the Commission thus lacks the statutory authority or discretion to impose further restrictions on such ownership, either in its local radio ownership rules or on a case-by-case basis in acting on radio station license assignment or transfer applications.

In addition, regardless of the extent of the Commission's statutory authority in this area, the record of comments and empirical evidence also demonstrates that consolidation within the limits of Section 202(b) has had no adverse effects on competition or diversity in local radio markets. Indeed, the record shows that such consolidation has resulted in significant public-interest benefits by, *inter alia*, improving the quality of radio broadcast service (including more locally selected and locally originated programming), particularly in many of the smaller and mid-size markets in which Cumulus operates. Consolidation has also enhanced competition for advertising dollars and dramatically improved the quality and diversity of the broadcast products available to both listeners and advertisers.

Notwithstanding this overwhelming record evidence of pro-competitive, public-interest benefits from radio consolidation, both Davis Broadcasting, Inc. of Columbus ("Davis") and the National Association of Black Owned Broadcasters, Inc. ("NABOB") take this rulemaking proceeding as an opportunity to criticize recent assignment application grants, and to argue for new definitions of local radio "markets" based upon the alleged anticompetitive aspects

of such grants. Specifically, Davis attacks the grant of applications for assignment of the licenses of six radio stations in the Columbus, Georgia market from Cumulus Licensing Corp. ("Cumulus Licensing") to Clear Channel Broadcasting Licenses, Inc., in *Solar Broadcasting Company, Inc., Memorandum Opinion and Order*, FCC 02-62 (released March 19, 2002) (the "Columbus Decision"), and NABOB criticizes the grant of applications for the assignment of the licenses of seven radio stations in the Columbus-Starkville market to Cumulus Licensing in *Golden Triangle Radio, Inc., Memorandum Opinion and Order*, FCC 02-51 (released March 19, 2002) (the "Columbus-Starkville Decision"). However, as demonstrated herein, the levels of common local radio ownership resulting from both the Columbus Decision and the Columbus-Starkville Decision, which were issued pursuant to the Commission's current rules, are pro-competitive and serve the public interest. Accordingly, these grants cannot justify any changes to the Commission's rules concerning the definition of radio markets.

II. CONTRARY TO NABOB'S COMMENTS, THE COMMISSION'S COLUMBUS-STARKVILLE DECISION DOES NOT SANCTION AN ANTICOMPETITIVE MARKET SITUATION; NOR DOES IT ILLUSTRATE THE NEED TO SWITCH TO AN ARBITRON-BASED OWNERSHIP RULE.

NABOB argues in its comments that the Commission's current methodology for defining radio markets is flawed. Specifically, NABOB asserts that the Commission should have analyzed compliance with the local radio ownership rule based upon an Arbitron market definition, rather than using the signal-contour overlap standard embodied in Section 73.3555 of the Commission's rules.[2] It further argues that the Columbus-Starkville market illustrates the anticompetitive consequences of the current rule. Neither assertion has any merit.

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[2] In Cumulus Licensing's Opposition to T&W Communications, Inc.'s Petition for Reconsideration of the Columbus-Starkville Decision, Cumulus Licensing illustrated that the

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First, as recognized in the Columbus-Starkville Decision, the voluminous filings submitted to the Commission in that proceeding failed to demonstrate any anticompetitive effects in the local radio market, much less that any such effects were caused by application of the market definition contained in the Commission's current ownership rules. Nonetheless, NABOB's comments re-argue unfounded accusations that have already been placed before the Commission by T&W Communications, Inc. ("T&W"),[3] namely that Cumulus Licensing has engaged in "predatory pricing" in Columbus-Starkville by offering free advertising spots and selling combination advertising packages. (NABOB Comments at 10-11.) However, as shown in that proceeding, not only do such activities fail to amount to anticompetitive conduct, they actually may be "efficient and procompetitive." (Columbus-Starkville Decision at ¶ 34.)

Second, as the Commission has acknowledged previously, Arbitron markets change regularly, the number of rated stations fluctuates, and the "home market" designation and audience ratings of stations can change depending upon a number of factors, some of which may be within the control of individual licensees. *See Memorandum Opinion and Order and Further Notice of Proposed Rule Making, Revision of Radio Rules and Policies*, MM Docket No. 91-140, 7 FCC Rcd 6387, 6394-95 (1992). Moreover, particularly in smaller and mid-sized markets, the Arbitron-defined Metro does not necessarily include all stations that may be geographically

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Commission properly analyzed the circumstances using its current definition of radio markets, since an ongoing rulemaking proceeding "does not suspend the application of existing substantive rules." Cumulus Licensing's Opposition at 3-4, *quoting Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145 (1999), ¶8, File Nos. BAL/BALH-19980922EA-ED, EK, BAL/BALH-19981028EC-ED (filed May 1, 2002). Cumulus hereby incorporates by reference that Opposition and Cumulus's subsequent December 5, 2001 submission to the Audio Services Division in that same matter into these Reply Comments.

[3] As explained in NABOB's comments, NABOB's counsel also represents T&W and the principal owner of T&W is the President of NABOB. (NABOB Comments at 9, fn. 6)

located so as to provide service to the same listeners or to sell advertising to the same advertisers. In fact, many radio stations in the United States are not even located within Arbitron-defined Metros. As a result, a definition of radio markets based upon Arbitron data would cause considerable uncertainty when calculating the number of stations and measuring permissible levels of ownership in a given market, and would not necessarily provide a more reliable standard than the objective criteria of predicted signal contours.

There would also be a significant statutory problem with adopting NABOB's proposal. While Section 202(b)(1) does not expressly define the term "radio market," the Commission's existing methodology for defining markets and counting stations have been consistently used since 1992. When Congress adopted the very specific numerical limits for Section 202(b)(1) to relax radio station ownership restrictions in local markets, Congress was aware of the Commission's existing definition and specifically did not alter it. As Chairman Powell has stated, "proper statutory interpretation would lead one to conclude that Congress set its numerical limits against the market definition that prevailed in regulation at the time, and not a definition that had not been used for this purpose previously." *Definition of Radio Markets*, MM Docket No. 00-244, Concurring Statement of Commissioner Michael K. Powell (Dec. 6, 2000), FCC 00-427 at 24. Thus, in implementing Section 202(b)(1) and revising Section 73.3555(a)(1) as directed by the statute, the Commission in 1996 specifically noted that the market-definition aspects of the local radio ownership rule "as set forth in previous Commission decisions, are unaffected by the Telecom Act and will remain in effect." *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 FCC Rcd 12368, 12370 (1996). Accordingly, it would be contrary to the intention of Congress to promulgate changes to the Commission's rules that would effectively

restrict the levels of local radio station ownership envisioned when Section 202(b)(1) was enacted.

III. CONTRARY TO THE COMMENTS SUBMITTED BY DAVIS, THE COMMISSION'S COLUMBUS DECISION SIMILARLY DOES NOT JUSTIFY ANY CHANGES IN THE LOCAL RADIO OWNERSHIP RULE.

In its comments, Davis similarly claims that use of the current definition of radio markets in the local radio ownership rule, as reflected in the Columbus Decision, permits "unfair competition". (Davis Comments at 2.) This is not the first time that Davis has argued that a grant of those applications would have anticompetitive effects. In fact, the "case study" that Davis attaches to its comments in this proceeding is simply a copy of its December 19, 2001 submission to the Commission in the Columbus, Georgia proceeding. However, as the Columbus Decision makes clear, the Commission has thoroughly considered Davis' claims of anticompetitive conduct and has rejected those claims.

For example, the Commission declined to find that the offering of advertising packages or discounts for multiple-station buys was anticompetitive in the Columbus, Georgia market, and in fact recognized that such activities may be "efficient and procompetitive." (Columbus Decision at ¶64.) Moreover, the Commission found Davis' assertions of predatory pricing in that market to be "purely speculative." (Columbus Decision at ¶ 65.) In sum, the Commission concluded that there were "no substantial and material questions of fact as to the effect of the proposed transaction on economic competition that would warrant further inquiry." (Columbus Decision at ¶ 68.)

Nonetheless, based upon its erroneous conclusion that the Columbus Decision allows anticompetitive conduct in the Columbus, Georgia market, Davis asserts in its comments that a new standard for defining local radio markets should be adopted – namely, using

overlapping service area (60 dBu) contours, as opposed to overlapping principal community (70 dBu) contours. (Davis Comments at 2-3.) As a result, Davis would have the Commission substantially expand the size of radio markets using the larger service area contours, while retaining the current limits on the maximum number of radio stations that may be owned in a radio market.[4] Not only has Davis failed to justify the need for such changes in rules, but such a result clearly was not contemplated by Congress in enacting 202(b)(1), for the same reasons as stated above with respect to the proposed Arbitron market definition.

IV. CONCLUSION

As demonstrated in Cumulus's initial Comments, Section 202(b) of the 1996 Act requires the Commission to adhere to the statute's specified numerical station limits, rather than engage in a case-by-case evaluation of market concentration based upon extra-statutory considerations of competition or diversity. Moreover, there is no basis in the record of this proceeding for the Commission to impose any additional ownership restrictions in its rules. The experience to date confirms that local radio station ownership consolidation within the Congressionally-set limits — especially in many smaller and mid-sized markets in which Cumulus operates — has been pro-competitive and beneficial to the public interest by enhancing the radio broadcast product for listeners and advertisers, while achieving significant cost savings and efficiencies. Accordingly, modifications to the methodology for defining radio markets or to the Commission's local radio ownership rules, such as those suggested by commenters NABOB and Davis, are not warranted.

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[4] *See* Davis Comments at 4-5 (asserting that if the Commission had used overlapping service area contours, it would have concluded that Clear Channel was operating with one station over the statutory limit).

Respectfully submitted,

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May 8, 2002

CERTIFICATE OF SERVICE

I, Valerie A. Wiggins, a secretary in the law firm of Paul, Hastings, Janofsky & Walker LLP do hereby certify that I have on this 8th day of May, 2002, caused a copy of the foregoing "Reply Comments of Cumulus Media Inc." to be served by first class mail, postage prepaid, upon the following:

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